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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS HQ, 20 Meads, 3/F
4251 Resnet, N.W.
Washington, DC 20536

EB 06 2004

FILE: WAC-02-026-53626 OFFICE: CALIFORNIA SERVICE CENTER

DATE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:


INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner.
Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an employment services and placement company that seeks to employ the beneficiary as an accountant. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to provide sufficient evidence to establish that it was an employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). On appeal, counsel submits a brief.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;
- (3) Has an Internal Revenue Service Tax identification number.

Further, under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed and the section states that:

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of employment and to provide any required documentation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) two of the director's requests for additional evidence; (3) the petitioner's two responses to the director's requests; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an accountant. Evidence of the beneficiary's duties in the record includes: the I-129 petition; the petitioner's letter of September 20, 2001 that accompanied the petition; the document entitled "California Subscriber Service Agreement" (Service Agreement) and the "Addendum Exhibit B." According to this evidence, the beneficiary would perform duties that entail: preparing quarterly and yearly tax information and reports, payroll statements, deductions, monthly profit and loss reports, and financial statements; implementing a computerized accounting system; performing audits; and preparing reports of findings and recommendations for management. The petitioner indicated that a qualified candidate would possess a bachelor's degree in accounting or a related field.

The director denied the petition, finding that petitioner did not establish that it would be the employer of the beneficiary.

On appeal, counsel states that under the terms of the Service Agreement between the petitioner and Pioneer Communications (the Subscriber), the petitioner would act as the beneficiary's employer while the Subscriber would benefit from the beneficiary's services. Counsel states that the petitioning entity is the employer: it has an Internal Revenue Service tax identification number; it will engage the beneficiary to work within the United States at the Subscriber's location; and it has a primary employer-employee relationship with the beneficiary, even though the beneficiary's services will be performed at the Subscriber's location and for the Subscriber's benefit. Counsel maintains there will be an employer-employee relationship because the petitioner will hire, pay, supervise, and discharge the beneficiary as shown in the Service Agreement. Counsel states that the petitioner is responsible for claims arising from the beneficiary's work product, and for indemnifying such claims, and counsel states that, if injured, the beneficiary is required to visit the petitioner's company doctor.

Counsel further claims that the Service Agreement, entered into on August 3, 2001, and the documents entitled "Exhibit B," "Commitment to Hire," and "Agreement" establish that the petitioner has a contract with a firm that requires the beneficiary's services. Counsel states that the LCA is valid because Norwalk, California, is within Los Angeles County, and that the Commitment to Hire and the Agreement specifically list the Norwalk, California, location. Finally, counsel claims that the documents are binding.

According to the evidence in the record, the petitioning entity does not satisfy the definition of a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

Whether the petitioner is considered a United States employer turns on the language contained in the Commitment to Hire, the Agreement, the Service Agreement, and accompanying addendum and exhibits. The AAO will first review the Agreement, executed on August 3, 2001. The Agreement states that the petitioner is regarded as the "job placement agency" and Pioneer Communications as the "employer," and the Agreement states, in part, that the employer agrees to:

engage the services of the job placement agency to find, pre-qualify, interview, evaluate, and process the application and other pertinent employment and legal document of the applicant for the purpose of lawful, gainful and equitable employment.

The Agreement further states that the employer agrees to hire the beneficiary for the position of accountant after the completion of document processing. In the Agreement, the employer (Pioneer Communications) guarantees the continuous employment of the

beneficiary from October 20, 2001 to October 20, 2004; specifies the hourly salary that would be paid; indicates the job location; and states "for [its] services, the job placement agency shall be compensated by the employer the amount of equivalent to one month['s] salary."

The language of the Agreement contradicts counsel's assertion that the petitioning entity would be the beneficiary's employer. First, the language in the Agreement plainly states that the employer, Pioneer Communications, would hire the beneficiary and pay the beneficiary's salary; this undermines counsel's assertion that the petitioner would have the sole responsibility to hire and compensate the employee. Second, the explicit language of the Agreement, that the petitioner would be known as the "job placement agency" and Pioneer Communications as the "employer," reveals that the petitioning entity serves as a placement agency, not an employer. Third, the language in the Agreement, that "the job placement agency shall be compensated by the employer the amount equivalent to one month['s] salary" for its services, obviously implies that the petitioning entity functions as a placement agency that receives a one-time fixed fee for its services and would relinquish all control over and responsibility for the beneficiary following the beneficiary's placement with a company. Thus, the petitioner would not hire, pay, fire, supervise, or otherwise control the work of the beneficiary.

The AAO will now review the Service Agreement, entered into on August 3, 2001. Counsel's claim that the Service Agreement establishes the existence of the petitioner's employer-employee relationship with the beneficiary is not persuasive. Counsel asserts that the language of the Service Agreement states that the petitioner will hire, pay, supervise, and discharge the beneficiary; however, paragraph V of the Service Agreement refutes this as it states that the Subscriber (Pioneer Communications) is the employer of the beneficiary. Furthermore, paragraph VI, section G of the Service Agreement states that the petitioner and Subscriber are co-employers with respect to supervising, disciplining, and terminating employees. In addition, contrary to counsel's contention, that the petitioner will be responsible for claims arising from the beneficiary's work product, and for indemnifying the claims, the Service Agreement explicitly lays this responsibility onto the Subscriber. (paragraph V, sections D and P). Finally, the Addendum, Exhibit B, states that the president/owner or designated representative of the company are solely responsible for all hiring and firing through the evaluation and recommendation of the Human Resource Department. Notwithstanding the vagueness of this language, it suggests that Pioneer Communications has authority to hire and fire the beneficiary.

Neither the Agreement nor the Service Agreement are sufficient evidence to establish that the petitioner satisfies the

definition of employer as set forth at 8 C.F.R. § 214.2(h)(4)(ii). Given such fundamental differences between the Agreement and the Service Agreement, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, the evidentiary value of all evidence contained in the record is highly questionable.

In conclusion, the petitioning entity fails to establish that it would be the beneficiary's employer as required by the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.